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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER,

vs.

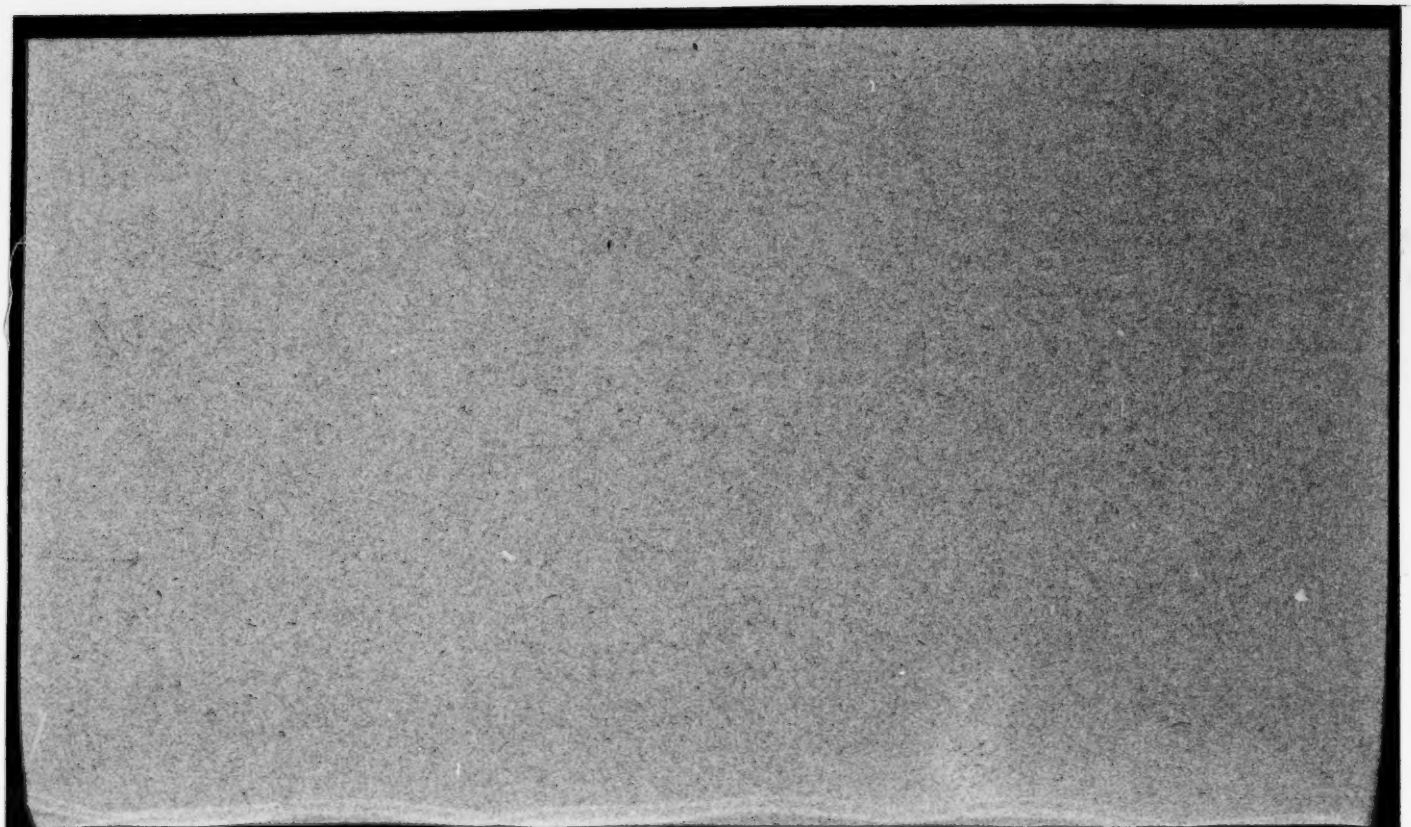
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1933

CERTIORARI GRANTED MARCH 27, 1933

(37,398)



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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 10681, Criminal Docket

UNITED STATES, by Indictment,

v.

JOSEPH A. BROGNA et al.

INDICTMENT

First Count. The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Joseph A. Brogna of Chelsea, in the District of Massachusetts, and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the ninth day of September, in the year one thousand nine hundred and thirty-one, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston, in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more [fol. 2] or less, of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

Second Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that Joseph A. Brogna of Chelsea, in the District of Massachusetts, and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the thirteenth day of September, in the year one thousand nine hundred and thirty-one, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston, in said District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, two ounces, more or less, of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA

This indictment is presented by the Grand Jury at the present September Term of this court, A. D. 1931, when, to wit, October 21, 1931, the Honorable James A. Lowell, District Judge, sitting, the said defendant Angelo Quercia is set to the bar and has this indictment read to him, whereupon he says that thereof he is not guilty.

On the said twenty-first day of October, A. D. 1931, a jury is duly empanelled and sworn according to law to try the issue, videlicit George W. MacDonald, Foreman, and fellows, videlicit, Sidney S. Rankin, Arthur D. Simonds, Charles A. Howard, Elwin F. Shepherd, Raymond E. Granfield, John A. Bruce, Alfred I. McNally, Xavier F. Faucher, Harold L. Harlow, Lawrence D. Duncan, Jr., and Joseph L. Brighton.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR DIRECTED VERDICT—Filed and Denied October 21, 1931

Now comes the defendant in the above-entitled action and moves that the court will order a verdict of not guilty on each and every count of the indictment upon the ground [fol. 3] that upon all the evidence the defendant is entitled to a verdict of not guilty, which the presiding judge is requested hereby to rule.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

IN UNITED STATES DISTRICT COURT

VERDICT, JUDGMENT, SENTENCE

Also on the said twenty-first day of October, A. D. 1931, this cause is committed to the jury, who, after hearing all matters and things concerning the same, return their verdict and on oath say that the defendant Angelo Quercia is guilty on each of the two counts of the indictment.

Thereupon, on the twenty-first day of October, A. D. 1931, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that the said defendant Angelo Quercia be imprisoned in the United States penitentiary at Atlanta, Georgia, for a term of five years on each of the two counts of the indictment, said sentences to run consecutively, and that he stand committed until said sentences be performed.

On the tenth day of November, A. D. 1931, a bill of exceptions is filed by the defendant Angelo Quercia, within extended time, and is allowed by the court on the twenty-second day of December, A. D. 1931.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions of Angelo Quercia—Filed November 10, 1931; allowed December 22, 1931

This is an indictment in two counts charging the defendant with a violation of the Harrison Narcotic Act. Each count alleged the same offense, but the same being committed on different dates. The indictment charges that the defendant did wilfully, unlawfully and knowingly dispense and distribute to one John Hesse, of Boston, in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces more or less of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

One HESSE, called by the Government, testified as follows:

By Mr. Stone:

Q. 1. What is your full name?
A. John Hesse.
Q. 2. Your occupation?
A. Narcotic agent.
[fol. 4] Q. 3. How long have you been in the service of the United States Government?
A. Going on twelve years.
Q. 4. In the same position?
A. Yes.

Q. 5. As a Federal narcotic officer?

A. Yes, sir.

Q. 6. Whether or not during the months of August and September, 1931, by direction of your superior officers you were engaged in an investigation of the drug traffic in Boston and vicinity?

A. I was.

Q. 7. As a result of that investigation, did you come in contact with one Joseph Brogna?

A. I did.

Q. 8. One of the defendants who pleaded guilty in this case?

A. Yes, sir.

Q. 9. You don't have to tell everything about Brogna, only in so far as it relates to this case. Did you purchase drugs from him?

A. Yes, sir.

Q. 10. How many purchases did you make?

A. I think I made five from Brogna.

Q. 11. Now, whether or not you paid him for it?

A. Richey Fineberg made some, and I made the others.

Q. 12. You made several purchases from Brogna?

A. Yes, sir.

Q. 13. Brogna did not know you were a Federal officer?

A. No, sir.

Q. 14. You introduced yourself as a member of the underworld; I assume that is correct?

A. Yes, sir.

Q. 15. As a dealer in drugs?

A. Yes, sir.

Q. 16. Now, did you meet Brogna again on the 9th of September?

A. I did.

Q. 17. Where did you meet Brogna?

A. In Somerville, Massachusetts, alongside of the Ford Plant.

Q. 18. You met him there by arrangement, did you?

A. By appointment; yes, sir.

Q. 19. You had a conversation with him?

A. Yes, sir.

Mr. Stone: You will object to the conversation?

Mr. Carroll: Yes.

Q. 20. You had a conversation with Brogna?

A. Yes, sir.

Q. 21. The defendant was not there?

A. No, sir.

[fol. 5] Q. 22. As a result of that conversation with Brogna on Friday—what time Friday, by the way?

A. About 7:30 p. m.

Q. 23. At the Ford Plant, Somerville. Give the result of that conversation, what took place.

A. Brogna left me. He drove in his truck to 30 Puritan Road, where he disappeared from my sight, and Fineberg and myself followed that truck across the boulevard, up the hill and back to where we were to meet Brogna.

Q. 24. You followed him where?

A. To 30 Puritan Road.

Q. 25. What city?

A. Somerville. We got back to the place where we were to meet Brogna, and a very few minutes later Brogna came back to me with the defendant Quercia.

Q. 26. State the conversation. Come back to you where?

A. Alongside the Ford Plant in Somerville.

Q. 27. Brogna and Quercia?

A. Yes, sir.

Q. 28. You are there, Fineberg is there——

A. Quercia is there and Brogna.

Q. 29. Did you have any conversation?

A. I did.

Q. 30. State the conversation.

A. As they came up to the car I was sitting in, Brogna said to me, "Mack, shake hands with Tony. He is the main connection."

Q. 31. What does that mean?

A. He is the principal dealer, he is the top man.

The Court: What is that?

The Witness: He is the principal dealer in drugs, he is the head. "Shake hands with Tony. He is the main connection."

Q. 32. Who is Tony?

A. This man [indicating the defendant]. We shook hands, and I said to Quercia, "Tony," I said "the price is too high."

Q. 33. How much was the price quoted you?

A. Eighty dollars an ounce. "The price is too high. Nobody can make any money at that. It is too high." He said to me, "The price is not too high. I have a doctor up in Maine who sends $110 for five ounces at a time. I know it is not too high." I said, "It is. Forty or fifty dollars is the price." He said, "The best I can do is $75 an ounce. Take it or leave it."

Q. 34. Who said that?

A. This defendant. I said, "I have to have it. I will [fol. 6] take three pieces", meaning three ounces, at $75 an ounce, so Quercia directed me to give Joe Brogna $225.

Q. 35. What did he say to you?

A. He said, "Give the money to Joe. Joe will bring you back your stuff. I don't want to have anything to do with you in this business. You do all your business with Joe. He will be back with the stuff."

Q. 36. The other defendant who pleaded guilty?

A. That is the defendant who pleaded guilty. So I gave Joe the money.

Q. 37. How much money did you give Joe?

A. $225 on leaving and $5 when he returned. They left, and Joe came back about 8:15 and handed me a package with three envelopes, each envelope supposed to have an ounce.

Q. 38. How many ounces?

A. Two ounces and some grains.

Q. 39. About three ounces?

A. About three ounces.

Q. 40. You paid for three ounces?

A. Yes, sir.

Q. 41. Seventy-five dollars an ounce?

A. Yes, sir.

Q. 42. Will you select the approximate three ounces sold on September 9th [handing witness a package]?

A. This [indicating] is the package. It was delivered in this bag.

Q. 43. Is this the original bag in which the stuff was delivered?

A. Yes, sir.

Q. 44. Did you see any stamps on the packages? Is it in the same condition as it was when you received it from Joe?

A. Yes, except a sample was taken out of that bag by the United States chemist.

Mr. Stone: This is offered in evidence for identification, subject to the testimony of the chemist, who will be on later, as to the character of it.

[Bag containing three packages of alleged morphine marked "Exhibit 1 for Identification".]

Q. 45. Is the defendant, with whom you had the conversation on September 9th at the Ford factory in Somerville and who was introduced to you as the boss and who made the bargain with you as to the price, is he in the court room now?

A. Yes, sir.

Q. 46. Where is he?

A. Right alongside Mr. Carroll.

Mr. Stone (to the defendant): Will you stand up?

[fol. 7] Q. 47. Is that the man?

A. That is the same man; yes, sir.

Q. 48. Now, did you make any other purchase subsequent to the 9th of September?

A. I did. On the 13th of September, I bought two ounces of morphine from Joe Brogna.

Q. 49. You met him where?

A. 29 Spring Street, Chelsea, Mass.

Q. 50. Was that pursuant to an arrangement you made with this defendant?

A. With this defendant.

Q. 51. Was the price the same?

A. No, sir; the price went up $5—$80.

Q. 52. What excuse was there for $5 more?

A. I don't know.

Q. 53. Whether or not other officers followed Joe on the 13th after the meeting with you?

A. Agent Bradshaw, Mr. Artis and Mr. Sheehan.

Q. 54. They followed him, and they will testify——

A. —what took place.

Q. 55. After you saw him, he came back?

A. I met Joe at his home. He stood there waiting to finish washing an automobile and dressing. He put his family in the truck and drove to 22 Dorrance Street, Boston, near the Elevated, where he directed me to wait. I had an order for seven ounces, he wanted money for seven. I told him——

Mr. Carroll: Just a minute.

Q. 56. You had a conversation with Joe?

A. I had.

Q. 57. As a result of that conversation, Joe disappeared?

A. Joe disappeared, and Joe came back and delivered to me two ounces of morphine.

Q. 58. Have you the two ounces there?

A. I have them here some place [handing package to Mr. Stone].

Q. 59. Whether or not they were delivered to you in this identical condition, outside of——

A. Outside of the fact I opened them and took a sample out.

Q. 60. There were no stamps?

A. No stamps.

Mr. Stone: I offer these in evidence, subject to testimony of the chemist:

[fol. 8] [Bag containing two packages of alleged morphine marked "Exhibit 2 for Identification".]

Q. 61. That cost $160?

A. $160.

Q. 62. What is the other stuff?

A. That is drugs, evidence in the Brogna case.

Q. 63. Before you met the defendant?

A. Before I met this defendant; yes, sir.

Q. 64. Now, subsequent to these purchases and delivery of the stuff you obtained a warrant?

A. No warrants of arrest. We obtained search warrants.

Q. 65. What did you do subsequent to this last delivery and sale? When did you meet Quercia again, this defendant?

A. At 30 Puritan Road, about four o'clock on the afternoon of September 13th.

Q. 66. What kind of day was it, a hot day or a cold day?

A. A beautiful fall day—hot.

Q. 67. You met him on the 13th?

A. Yes, sir.

Q. 68. Where did you meet him?

A. 30 Puritan Road.

Q. 69. Did you arrest him?

A. I did.

Q. 70. Subsequent to the arrest, was the place searched?

A. Yes, sir.

Q. 71. What was found?

A. There was found a scale for weighing morphine; there was found about half an ounce of morphine, 100 and some grains, an old pistol that did not amount to anything.

Q. 72. What did you find?

A. An old pistol, I said, a gun.

Q. 73. An old gun?

A. Yes, sir.

Q. 74. Another man was there?

A. A man named Patterson there took the full responsibility for the drugs scale, drug and gun.

Q. 75. You turned that over to the police?

A. The police department of Somerville handled that case.

Q. 76. That would be a State offence?

A. Yes, sir.

Q. 77. When you brought him to the station, did you search the defendants after they were booked?

A. No.

Q. 78. Or at any time?

A. No, I didn't make a search. While we were at the station, at the Somerville police station, making an examination of money taken from Joe and checking with my [fol. 9] memorandum slips, the defendant spoke up, 'I have some money here.' We were going to search him. 'Do you want to look at that?'

Q. 79. You were going to search him anyway?

A. He handed us forty-five or fifty dollars. We compared it with our memorandum and we found among his money one of the five dollar bills I had paid Joe Brogna on September 9th.

Q. 80. For what?

A. Morphine.

Q. 81. You identify it by what?

A. By the serial number.

Q. 82. You have it here?

A. Yes, sir; this is the five dollar bill.

Q. 83. What is this?

A. That was taken from Joe. Here is the five dollar bill taken from money in his possession and here are the serial

numbers of those five dollar bills which I gave Joe Brogna on the night of September 9th in payment of three ounces of morphine.

Q. 84. This sale was made prior——

A. Prior to September 9th, when I made that bargain.

Mr. Stone: I offer this in evidence, the five dollar bill, Government Exhibit 3.

[Five dollar bill taken from money in possession of the defendant marked "Exhibit 3".]

Q. 85. What else did you observe?

A. I called the defendant's attention to the serial number on that bill and the memorandum slip at the time I took the bill from his money.

Q. 86. What did he say?

A. Not a word. He didn't answer,

Q. 87. Anything else?

A. That is about all."

Mr. Stone: Your witness.

Cross-examination.

By Mr. Carroll:

X Q. 88. How long had you known Brogna before you first met this defendant?

A. About a month.

X Q. 89. During that time you had purchased drugs from Brogna?

A. Yes, sir.

X Q. 90. And it was not until the 9th of September that you first met this defendant?

A. That is true.

X Q. 91. And you met him as a result of the talk you had [fol. 10] with Brogna, during which you had some discussion as to the price of narcotics?

A. Yes, sir.

X Q. 92. Brogna left you on that occasion and came back with this defendant?

A. Yes, sir.

X Q. 93. And the substance of your talk on that occasion was the price that Brogna was demanding for the narcotics?

A. Yes, sir.

X Q. 94. And after that talk you say you paid some money to Brogna for some narcotics?

A. I did.

X Q. 95. You paid in the presence of your own men—how much money did you pay?

A. $225.

X Q. 96. $225?

A. Yes, sir.

X Q. 97. And this defendant left with Brogna after that talk?

A. Yes, sir.

X Q. 98. Later Brogna returned, himself, with the narcotics?

A. Yes, sir.

X Q. 99. And this man was not present with him?

A. No.

X Q. 100. So that at no time did this man ever deliver to you any narcotic drugs?

A. He never did.

X Q. 101. He never sold any to you?

A. This man made the price.

X Q. 102. Did he ever sell it to you by delivering it personally to you?

A. No, sir.

X Q. 103. When did you next see him?

A. On the afternoon of September 13th.

X Q. 104. Where?

A. 30 Puritan Road.

X Q. 105. Who was present at that time?

A. Sergeant Connolly, narcotic agent Sheehan, narcotic agent Artis and Richey Fineberg.

X Q. 106. At that time you had no talk with this defendant?

A. Other than to tell him he was under arrest.

X Q. 107. Prior to that time you had met Brogna and had made another purchase of narcotic drugs?

A. Yes, sir.

X Q. 108. This defendant was not with him?

A. No, sir.

X Q. 109. You had not seen him until you went to 30 Puritan Road, accompanied by the other police officers?

A. That is right.

[fol. 11] X Q. 110. At that time you told him he was under arrest?

A. Yes, sir.

X Q. 111. You brought him to the Somerville police station?

A. Yes, sir.

X Q. 112. So that the drugs you received on the day of the 13th from Brogna, this defendant was not present and had no conversation with you relative to them?

A. No, sir, he was not present.

X Q. 113. You say when you went to the Somerville police station you searched Brogna and took some money from the defendant?

A. Donovan searched him. I found three five dollar bills, two I had spent on the 13th and one I spent on the 9th. At the same time I found that five dollars.

X Q. 114. Mr. Hesse, this receipt, or this paper here, contains the serial numbers of a great many bills, doesn't it?

A. Yes, sir—probably three or four hundred dollars there.

X Q. 115. There is nothing on that paper that distinguishes the money that you paid to Brogna on any one particular occasion?

A. No. That is the 9th. I think you will find it dated so there, the 9th.

X Q. 116. You purchased three ounces on September 9th. How much money did you pay him that day?

A. $230; $225 when he left with the defendant Quercia, and $5 he demanded on his return with the drugs.

X Q. 117. That [indicating the witness' memorandum] totals $365, does it not?

A. Yes.

X Q. 118. There is nothing on that paper that distinguishes this particular money that you gave to Brogna on September 9th?

A. No; I gave him $225 and $5.

X Q. 119. But that money on that paper is over $300?

A. Yes, sir; that is the total of the money I had in my possession at that time.

X Q. 120. It is not the money you gave Brogna at that time?

A. Of this there was $230 given to Brogna, of this $300.

X Q. 121. What is there on that paper that indicates the money you paid to Brogna?

A. Nothing on the paper. That is carelessness on my part.

[fol. 12] X Q. 122. So that the substance of your testimony, Mr. Hesse, is that the only contact you had with this defendant in the presence of Brogna was on the night of September 9th, at which time you discussed price, and this defendant at no time delivered personally *so* sold to you any narcotic drug?

A. That is right.

Mr. Carroll: That is all.

Redirect examination.

By Mr. Stone:

Q. 123. This list contains the serial number of the money you gave to Brogna?

A. The $225 is contained therein.

Q. 124. There is a serial number on this bill?

A. Yes, sir.

Q. 125. That serial number is right here?

Mr. Carroll: I will admit that is on the list.

Q. 126. You found that identical serial number in the possession of this defendant?

A. Yes, sir.

Recross-examination.

By Mr. Carroll:

X Q. 127. There is nothing on that paper that shows that five dollars was given to him on the night of the 9th of September?

A. No, sir.

Mr. Stone: He says that is part of the money he gave Brogna that night.

Redirect examination.

By Mr. Stone:

Q. 128. It is part of the money you gave Brogna?
A. Yes, sir.
Q. 129. It might be that night?
A. That night.

The Court: I understand that list to be a list of money you had in your pocket on September 9th?

The Witness: A list of the total moneys I had in my possession.

The Court: With the serial numbers?

The Witness: Yes, sir, and I did not when I left Brogna and Quercia take my money out again and go back over it and strike out the bills I had given Brogna.

The Court: On September 13th, did you have a different list?

The Witness: Yes, sir. I have that list here.

The Court: All right. That is all.

Mr. Stone: Thank you very much, Mr. Hesse.

[fol. 13] The next witness called by the United States was Richey Fineberg, who testified that he was an informer employed by the United States, that he was a user of drugs and he was present with Hesse at the time Hesse had the conversation on the night of September 9 with Brogna.

On cross-examination he admitted that Quercia at no time delivered any drugs to Hesse or was present when Brogna delivered any.

The next witness, Robert W. Artis, testified that he was a Federal narcotic agent; that on the afternoon of September 13 he followed the defendant Brogna and covered him from the time he left Hesse at Boston up to the time he entered the house at 30 Puritan Road, Somerville; that he saw the defendant Quercia come out with Brogna and Brogna's family and get into the truck that Brogna was driving; that he followed the truck but lost it about one-

quarter of a mile after it had left 30 Puritan Road; that it took him about 20 minutes to get back to the place where Hesse was going to meet Brogna and that when he returned Brogna was alone; that from the time he lost the defendant until he found Brogna and Hesse he does not know what stops were made; that he returned to the house and assisted in the arrest of the defendant, who was sitting in the house in his pajamas.

The next witness called by the United States was JOHN A. SHEEHAN, who testified that he was a Federal narcotic agent and that he assisted in the search of the house at 30 Puritan Road; that at the time of the search he found certain narcotic drugs in a room occupied by another roomer and this roomer admitted the drugs belonged to him and he had been prosecuted for their possession in the Somerville court; that a search of the room occupied by Quercia did not reveal any drugs.

The Government introduced the witness ARTHUR L. MORESKI, who testified that he was a Government chemist; that he had examined the sample and that it was morphine hydrochloride.

The defendant testified on his own behalf and made a general denial of all the charges.

[fol. 14] The foregoing is all the material evidence.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

At the close of the evidence the defendant made a motion for a directed verdict, which was denied and exception duly noted.

Defendant's Requests for Rulings

The defendant presented certain requests for rulings as follows, which requests were denied and exception duly taken:

1. That upon all the evidence the Government has not sustained the burden of proof and the court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

2. The Government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

3. The Government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

4. Upon all the evidence the Government has not proved that the defendant sold, dispersed or distributed the morphine alleged in said indictment.

5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispersed or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the

[fol. 15] tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

At the close of the evidence the court gave the following charge to the jury:

Charge to Jury

Mr. Foreman and Gentlemen of the Jury: I will say a few words to you first about your functions and mine. I give you the law, and what I say is the law is binding on you; and if I state it wrong the Court of Appeals will correct me. I tell you what the law is, and that you must abide by. I also in this court, in the United States court, have the right to give you my opinion of the evidence, to say whether I think a certain witness is truthful or not, to tell you my opinion on the whole evidence; but that is not binding on you. As to the facts, you must disregard any opinion I may give you of the evidence; and it is your duty to go against my opinion if you don't agree with it.

Now, as in all criminal cases, the defendant at the bar is presumed innocent until you are persuaded beyond a reasonable doubt by the evidence offered by the Government that he is guilty. A reasonable doubt merely means a doubt for which you can give a reason. It is the kind of doubt which you would act upon if you were going about your own affairs. There is no magic, no hidden meaning to "reasonable doubt". It is merely a doubt founded not on a whim or a hunch, as we call it, but on some fact, for which you can give a reason.

There is another thing which I should tell you. That is, the fact that this defendant was indicted—you heard the indictment read—the fact that he was indicted is no evidence against him. An indictment is merely a statement of the grand jury of twenty-three men that there is something which ought to be brought before you jurors, you petty jury, as we call you, of twelve men. The indictment is no evidence against him, and he is presumed to be inno-

[fol. 16] cent until you are persuaded beyond a reasonable doubt that he is guilty. And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

I don't think I care to say anything else, Mr. Foreman and gentlemen.

I will save your exception, Mr. Carroll.

At the close of the charge the court saved the defendant's exception to the whole charge and particularly to the part wherein the court said:

"And I rule, as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government, you may find him guilty under this indictment."

And later when he said:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact. I think that every single word [fol. 17] that man said, except when he agreed with the Government's testimony, was a lie."

VERDICT

The jury returned a verdict of guilty on each count of the indictment.

The defendant, being aggrieved by the denial of his motion for a directed verdict and the refusal to give his requests in form or in substance and the charge of the presiding judge, all as aforesaid, brings this bill of exceptions and prays that it may be allowed.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

Assented to.

Frederick H. Tarr, United States Attorney, by Elihu D. Stone, Assistant United States Attorney.

December 22, 1931. Exceptions allowed.

James A. Lowell, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF ANGELO QUERCIA—Filed November 10, 1931; allowed December 22, 1931

Now comes the defendant Angelo Quercia, in the above-entitled cause, and being aggrieved by the error committed in said proceedings and by the judgment of the court rendered against him, prays that an appeal to review the same may issue to the United States Circuit Court of Appeals for the First Circuit, and said appeal may supersede the execution of the judgment of this court against him, pending a review of said judgment and proceedings by said Circuit Court of Appeals.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

December 22, 1931. Appeal allowed except as to bail.

James A. Lowell, United States District Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 10, 1931

1. The court erred in denying the defendant's motion for a directed verdict of not guilty, as more particularly appears in his bill of exceptions.

2. The court erred in his charge to the jury in ruling, as a matter of law, that if the jury believed the evidence for the Government they could find the defendant guilty under the indictment.

3. The court erred in charging the jury as follows:

"Now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

4. The court erred in denying the following requests for rulings:

1. That upon all the evidence the Government has not sustained the burden of proof and the court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

2. The Government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

3. The Government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

4. Upon all the evidence the Government has not proved that the defendant sold, dispersed or distributed the morphine alleged in said indictment.

[fol. 19] 5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove, the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispersed or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

By His Attorneys, Joseph S. Carroll, Essex S. Abbott.

Citation, in usual form showing service on Frederick H. Tarr, omitted in printing.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE ORDERS ENLARGING TIME

MEMORANDUM.—Orders of enlargement of time for docketing case to, and including, April 20, 1932, are here omitted.—A. I. Charron, Clerk.

[fol. 21] In United States Circuit Court of Appeals for the First Circuit, October Term, 1932

No. 2688

Angelo Quercia, Defendant, Appellant,

v.

United States of America, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—January 3, 1933

Wilson, J.:

The appellant and one John Brogna were indicted under two counts and charged with selling, dispensing and distributing a narcotic drug on two separate days. Brogna pleaded guilty. The appellant was found guilty by a jury. The main issue was whether the evidence warranted a finding by the jury that the appellant participated as a principal in the sale of the drug, the officer who purchased the drug testifying that he paid Brogna for it and it was delivered to him by Brogna.

The officer, however, further testified that he had a conversation with the appellant and Brogna together as to the price to be paid, and the appellant was referred to by Brogna as the "main connection"; that the price was fixed by the appellant and the officer was told that Brogna would [fol. 22] deliver it and the money could be paid to Brogna; that the appellant did not want to have anything to do with the business.

After his arrest a five dollar bill paid to Brogna was found in his possession, identified by its serial number.

At the close of the evidence counsel for the appellant requested the court to instruct the jury that:

"4. Upon all the evidence the Government has not proved that the defendant sold, dispensed or distributed the morphine alleged in said indictment.

"5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove the defendant must be found not guilty.

"6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispensed or distributed the drug."

The court refused to give these instructions, but instructed the jury as a matter of law that if they believed the evidence for the government, they might find the appellant guilty.

As to the principal issue raised at the trial and by the requested instructions, viz: that there was not sufficient evidence to show that the appellant participated as a principal in the sale and distribution of the drug, we think the instruction of the presiding judge was a correct statement of the law. The instruction excepted to was evidently given instead of the instructions requested by the appellant.

It is true that whether the evidence of the government, even if believed, removes all reasonable doubts from the minds of the jury is a question of fact and not of law; and the instruction, if a direction to find the appellant guilty if the jury believed the testimony of the government, would have been prejudicial error; Grillo v. United States, 26 Fed. (2d) 461; but we think the jury could not have misapplied this instruction in view of other portions of the [fol. 23] charge, and the defense of the appellant as disclosed by the evidence.

The other part of the charge excepted to might well have been omitted. The presiding justice then went on to say:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost

always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

It is difficult to conceive of a jury accepting seriously such a standard for determining whether a witness was telling the truth.

The bald accusation by a presiding judge that a respondent in a criminal case is a liar is seldom justified, and, if ever, only under unusual circumstances. However, as this court has said in a previous case, Malaga v. United States, 57 Fed. (2d) 822, no hard and fast rule can be laid down for determining whether a presiding judge has exceeded his prerogative in instructing the jury upon the facts, and each case must stand on its own bottom.

In this case the testimony of the appellant to which the court referred is not printed in the record. So far as appears from the record, the appellant may have clearly deserved the characterization, and the appellant could not have been prejudiced thereby. The jury was expressly told that it was only the opinion of the presiding judge, and that if they did not agree, it was their duty to find him not guilty, which on the other hand may have been more favorable to the appellant than the evidence warranted.

The judgment of the District Court is affirmed.

[fol. 24] In United States Circuit Court of Appeals

Dissenting Opinion

Bingham, J. (dissenting):

The instruction of the presiding judge to the jury—"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he *wiped his hands* during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, *but that is the fact.* I think that every single word that man

said, except when he agreed with the Government's testimony, was a lie''—cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case. Although a presiding judge in the federal court may express his opinion on the facts, if he informs the jury that they are not bound by his opinion if they do not agree with him, nevertheless there is a limit beyond which he cannot go, and I am bound to say that the above instruction was so charged with passion and prejudice that it exceeded the bounds of fair comment, and caused a mistrial.

Furthermore, the instruction, couched as it was, was not only highly prejudicial, so far as it was an expression of opinion, but it contained a statement of fact by the presiding judge of which there was no evidence. He said: "You may have noticed, Mr. Foreman and gentlemen, that he (the accused) wiped his hands during his testimony * * * that is almost always an *indication of lying.* Why it should be so, we don't know, *but that is the fact.*" In other words, he said: If a witness wipes his hands during his testimony, it is a fact indicative of lying. There was no evidence in the case to this effect. In making this statement the presiding judge was testifying, and his testimony was of that subtle character that was highly prejudicial. It is not the province of a federal judge to testify in his charge—that is not comment on the evidence—and when he does so and his testimony is prejudicial, it will render the trial unfair. That is what happened in this case.

[fols. 25 & 26] On October 13, 1932, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the third day of January, A. D. 1933, the opinion of the court (page 21) and a dissenting opinion (page 24) were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 3, 1933

This cause came on to be heard October 13, 1932, upon the transcript of record of the District Court of the United

States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 3, 1933, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

Arthur I. Charron, Clerk.

MEMORANDUM RE STAY OF MANDATE

Thereafter, to wit, on January 19, 1933, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,398. U. S. Circuit Court of Appeals, First Circuit. Term No. 701. Angelo Quercia, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 15, 1933. File No. 37,398.